

BI-ANNUAL REPORT FOR FISCAL YEAR DECEMBER 2007

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David N. Cicilline
Mayor

City of Providence, RI PROVIDENCE EXTERNAL REVIEW AUTHORITY

February 7, 2008

Officers

Chair

Artin H. Coloian, Esq.

Vice Chair

Rochelle Lee

Treasurer

John Hearn

Secretary

Kohei Ishihara

Board Members

Stanley A. Bleecker

Kenneth Brown

Gladys Gould

Mary Jones

David Marshall

Ines Merchan

Brother Everett Muhammad

Frederick J. Price

George Thomas

Honorable Mayor and Members of the City Council
25 Dorrance Street
Providence RI 02903

Dear Mayor Cicilline and Members of the City Council,

Enclosed is the Providence External Review Authority (PERA) 2007 Bi-Annual final report submitted for your review. This report focuses on the statistical analysis of complaint data and the year's events.

I would like to acknowledge Mayor Cicilline, Council President Peter Mancini and the members of the City Council for your continued support for the Providence External Review Authority and the civilian oversight process. I want to also again thank the members of the City's Law Department who have responded to our questions and needs under the leadership of Joseph Fernandez. I want to thank the members of my staff at PERA and their contributions to the civilian oversight process this past year. I want to acknowledge the efforts of the PERA Board for their tireless efforts in support of the civilian oversight process. I would especially like to thank Luz Bravo-Gleicher who served as Chairperson, Dr. Arthur Jones who served as Vice-Chairperson and Phillip McKendall who had served as Treasurer as well as board members for their tireless efforts over the year to bring PERA to where it is today. Without their efforts and board members like them the civilian oversight process would still be on the drawing board. I would also like to recognize the efforts of the Providence Police Department, particularly Inspector Francisco Colon and the Internal Investigations and Inspection Division, for providing their ongoing cooperation.

Respectfully submitted,

Kevin E. Deary, Executive Director

Artin H. Coloian, Chairperson

Kevin E. Deary
Executive Director
Phone (401) 228-6989
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David N. Cicilline
Mayor

City of Providence, RI

PROVIDENCE EXTERNAL REVIEW AUTHORITY

550 Broad Street
Providence, RI 02907

“The Purpose and the Mission of PERA”

The purpose of the Providence External Review Authority (PERA) is to investigate allegations of misconduct on the part of officer(s) of the Providence Police Department, to make findings of fact and to make findings of fact and to make recommendations of potential disciplinary action to the Chief of Police.

PERA was established in 2002 by Providence City Ordinance No. 614 (Chapter 2002-39), to provide for a system of Civilian Oversight over the Providence Police Department. PERA has the mission and the authority to investigate and conduct hearing concerning allegations of misconduct on the part of sworn officers of the Providence Police Department.

If you believe that you have been the victim of misconduct committed by a sworn officer of the Providence Police Department, you have the right to report the incident to PERA. You may contact PERA at the address and telephone number provided above or you can email (PERA) at Pera@providenceri.com

PERA BOARD MEMBERS

Officers:

Artin Coloian, Chair:

Communication from Council President John Lombardi dated October 24, 2006, informing the City Clerk that he is this day appointing Mr. Artin Coloian as a member of the Providence External Review Authority (PERA) to serve the remaining term of the Reverend James Cook that expires in March 2008.

Artin H. Coloian, Esq. was elected chair of the PERA board by unanimous vote on November 6, 2007. He is a lawyer whose areas of practice are in Criminal Law and he is a member of the business community. Mr. Coloian also is the proprietor of a downtown restaurant here in Providence RI, called the "Side Bar and Grill."

Rochelle Lee, Vice Chairperson:

Communications from Thomas P. Whitten, Chairman, Providence Human Relations Commission, dated August 17, 2006, informing the City Clerk that he is this day appointing Rochelle Lee to the Providence External Review Authority (PERA), for a three (3) year term to expire in August 2009.

Ms. Lee is an urban planner with specialized expertise in real estate financing and property management. She has worked with non-profit, municipal and community-based sponsors to develop more than \$20 million in affordable housing in Rhode Island and Massachusetts. She taught English, U.S. History and Social Studies in the Boston Public Schools for five years; three years in a private school located in Watertown, Massachusetts and held various teaching posts at Northeastern University and Wheelock College. She currently serves on the board of several community-based organizations whose missions are to improve low and moderate-income neighborhoods, provide services to children and the elderly and the preservation of public services (such as recreational and library programs). She currently serves on the boards of Good News Housing/Community Land Trust, the RI HUD Tenant Project, the Library Reform Committee and Save Our Branches, (a coalition member of the Providence Public Library Reform Group) and is a founding board member of MUSIC ONE, a youth music enrichment program.

In 2006, she was appointed to the board of the Providence External Review Authority, (PERA) and as of January 28th of 2008 she has been elected Vice-Chairperson; she was appointed Commissioner for the RI Commission for Human Rights, the state's civil rights enforcement agency. Ms. Lee also volunteers as a Loan Committee member of the Minority Investment Development Corporation and serves as a volunteer with the Rhode Island based Parent Leadership Training Institute, (PLTI), dedicated to promoting parent engagement in public policy and social change. Ms. Lee is a Wellesley College alumna and holds a B.A. degree from the University of Massachusetts, (magna cum laude), a Masters of Art from Boston University and a Masters of City Planning from the School of Architecture at the Massachusetts Institute of Technology. She was a recipient of a HUD Fellowship to attend MIT. While completing her Master's Degree at Boston University; she studied at the University of West Indies in Kingston Jamaica and also spent time in Port au Prince, Haiti volunteering with a street arts program.

John Hearn, Treasurer:

Communication from Councilman Patrick Butler, dated January, 2005, informing the City Clerk that he is this day re-appointing John Hearn to the Providence External Review Authority (PERA), for a three (3) year term to expire in January, 2008.

John Hearn is currently a Providence resident. His parents are Irish immigrants who moved to Providence in 1946. His wife's grand parents are Italian immigrants who moved to Providence in the 1920's. He married his high school sweetheart, and they have two children, Amanda and Elliot. Mr. Hearn attended grade school at St. Raymond's. From there he attended Our Lady of Providence, and graduated from Hope High School in

Providence. It was nine years ago that he had an opportunity to take a job in management for a large tile manufacturer, Daltile, and he did. Today he handles commercial sales for greater Boston, Southeastern MA and RI. He is on the board of governors at Triggs Golf Club in Providence, and he is on a fund raising committee for Save Sight Rhode Island. As far as his outlook on the future of PERA, he is confident.

Kohei Ishihara, Secretary:

Communication from Councilman Miguel Luna dated June 29, 2005, informing the City Clerk that he is this day re-appointing Kohei Ishihara to the Providence External Review Authority (PERA), for a 3-year term to expire in June 2008.

Kohei D. Ishihara grew up in Rockville, Maryland where he first started analyzing race and oppression through his peer leadership work at St. Andrews Episcopal High School. Kohei moved to Providence, Rhode Island in the fall of 1998 to attend Brown University. Kohei then made the important decision to stay in Providence, RI and work to develop and empower the Southeast Asian community. Kohei is the co-founder and Executive Director of the Providence Youth Student Movement (PrYSM), a grassroots Southeast Asian youth organization committed to anti-racist organizing, youth empowerment, and community development (visit www.prysm.us). He is a founding PERA board member who joined PERA because he wanted to find a way to honor the community struggle for police accountability that started years before the death of Sgt. Cornell Young, Jr. "This country and nation is responding to terrorism by taking away the rights of ordinary citizens, by denigrating the lives of poor and struggling immigrants, and by building a police state where violence is institutionally enforced to preserve the American status quo." He feels that he is on PERA to enforce justice against police officers who have abused their power, or have used any size, shape, or form of illegal profiling. He sees PERA as strengthening the relationship between the community and the police, and preserving the respect and sanctity of both. In the future, he envisions the Providence Police Department and PERA working harmoniously to create alternative forms of policing, and working to build stronger, healthier, and safer communities.

Board Members:

Stanley A. Bleecker:

Communication from Councilwoman Rita M. Williams, dated March 8, 2006, informing the City Clerk that she is this day re-appointing Mr. Stanley Bleecker to the Providence External Review Authority (PERA), for a term to expire in March, 2009.

He was born in Providence, Rhode Island. He has a son and daughter and three grandchildren. His primary and secondary education was within the Providence school system including graduation from Classical High School. He is a graduate of Brown University with a Bachelor of Science in Electrical Engineering and obtained a law degree from Boston University. Upon graduation from college he worked for three years at the Westinghouse Electric Company, a company that no longer exists. Upon graduation from law school he went to work for the Providence Law Firm of Tillinghast, Collins and Graham for twenty-seven years. For most of those years he was a partner. He currently is a solo practitioner with an office in the city of Providence. Over the years he has held a number of positions in community and charitable organizations including President of the Board of Directors of Alias Stage, board member of Brown University, Rhode Island School of Design, Hillel, Board Member and Vice President of Rhode Island Community Mediation Center. He finds that working for PERA as a Board Member to be extremely worthwhile.

Kenneth Brown:

Communication from Councilman Kevin Jackson, dated June 1, 2006, informing the City Clerk that he is this day re-appointing Mr. Kenneth Brown, to the Providence External Review Authority (PERA), for a term to expire in June 2009.

Mary Jones

Communications from Councilman Terrence Hassett, dated July 27, 2006, informing the City Clerk that he is this day appointing Ms. Mary Jones to the Providence External Review Authority (PERA), for a three (3) year term to expire in July 2009.

Ms. Jones is a lifelong resident of Rhode Island and has been active in community affairs for many years.

David A. Marshall

Communications from Councilman John J. Iglizzi dated July 18, 2005, informing the City Clerk that he is this day appointing David A. Marshall to the Providence External Review Authority (PERA), for a three (3) year term to expire in July 2008.

Mr. Marshall is 47 years of age, married with (2) children- Bryan (18) and Jennifer (23). He is employed for 31 years with the Providence College Security Department as a Sergeant on the 11pm-7am shifts. He commands approximately 22 officers. He attended LaSalle Academy, graduating in 1975, went to Roger Williams College and CCRI and is now attending Providence College SCE. He is very active in the neighborhood and well respected by many. He entered the political arena with an unsuccessful bid for the 2002 City Council. He is interested in PERA because he believe that public voices should have a chance for fair actions and it should be known that everyone should be at least heard with interest and understanding. A fair judgment should be always made for BOTH PARTIES in all cases.

Frederick J. Price:

Communication from Councilwoman Josephine DiRuzzo, dated November 10, 2006, Informing the City Clerk that she is this day appointing Mr. Frederick James Price as a member of the Providence External Review Authority (PERA) term to expire in March 2008. (Mr. Price will replace Oscar Vargas, who was appointed March 14, 2005, who has been removed from the committee, for the remainder of the term).

Mr. Price is a retired prison guard having been employed at the Adult Correctional Institution. He is a life long Rhode Island resident.

Gladys Gould:

Communication from Councilman Luis A. Aponte dated April 26, 2007, informing the City Clerk that he is this day appointing Gladys Gould as a member of the Providence External Review Authority, for a three (3) year term to expire in July 2009.

Ines Merchan:

Communication from Councilwoman Balbina A. Young dated May 16, 2007, informing the City Clerk that she is this day appointing Ms. Ines Merchan as a member of the Providence External Review Authority (PERA) to expire in March 2008. (Ines Merchan will replace Mary K. Harris, who was appointed March 14, 2005, who has resigned from her three (3) year term).

Ines Merchan lives right in the community on Comstock Street. She is the mother of three teenagers. Ines has just recently graduated from URI. She has been living in Providence for at least 20 years. She has worked with non-profit every since she has had her children. Currently she works at the RI Foundation. She also has worked at DARE (Direct Action for Rights and Equality) for approximately 5 years.

Brother Everett Gomes-Muhammad:

Communication from Councilman John J. Lombardi dated April 9, 2007, informing the City Clerk that he is this day appointing Everett Gomes-Muhammad to the Providence External Review Authority (PERA), for a three (3) year term to expire in July of 2010.

Eva C. Hulse-Avila:

Communication from Honorable David N. Cicilline dated July 26, 2007, informing the City Clerk that he is this day appointing Ms. Eva C. Hulse-Avila as one of the three mayoral appointees to the Providence External Review Authority (PERA), for a term to expire in July 2010.

Mr. George Thomas:

Communication from Council President Peter S. Mancini dated December 19, 2007, informing the City Clerk that he is this day appointing George Thomas as a member of the Providence External Review Authority to fulfill a three- year term, which expires June, 2008. (George Thomas will replace Phillip McKendall).

STAFF

Mr. Kevin E. Deary, Executive Director

The PERA Board of Directors appointed him Executive Director on March 27, 2006. Mr. Deary is a retired FBI Agent with 25 years of service to the United States. He has served in numerous communities across America to include Minneapolis, New Mexico, Miami and Rhode Island. He has conducted numerous federal civil rights violation cases over the years. Mr. Deary has worked in the insurance industry investigating fraud, the tobacco litigation field and the private investigations field to include sensitive government background investigations since his federal retirement in 1994. Due to his 12 years of residency in Rhode Island he is familiar with the ethnic makeup of the various communities. Mr. Deary in his short time has brought PERA through the lawsuit by the FOP, developed solid working relationships with the Attorney General's Office, the Command Staff of the Providence Police Department, especially the Internal Investigations and Inspection Division, and the Rhode Island Chiefs of Police Association, the Roundtable of the Urban League, as well as community organizations throughout Providence. Mr. Deary is developing a Manual of Operations for PERA so its important work can continue on in an organized manner. Mr. Deary has supervised the staff at PERA so that the daily operations move smoothly. He has met with the Mayor and his staff, City Council members, numerous department heads and employees in order that PERA attain its goals within the city. He has assisted in training PERA Board Members as to their expected duties. He continues to meet with community support members and develop new advocates throughout the Rhode Island network.

Mr. Kevin E. Deary was officially appointed Executive Director April 11, 2007.

Mr. Roderick J. Kennedy, Case Investigator

He was appointed as the Investigator under Mr. Deary in May 2006. He brings 25 years of experience with the FBI to PERA. Mr. Kennedy investigated numerous federal civil rights cases in Rhode Island and Massachusetts during his career. Mr. Kennedy is a native of Rhode Island having been raised in Providence and attended Providence public schools and Providence College. He was a US Army helicopter pilot attaining the rank of Captain. Since his retirement from the FBI he has been involved in numerous investigations in Massachusetts and Rhode Island. His father still resides in Rhode Island. In addition Mr. Kennedy brings a strong knowledge of computers and data collection systems to PERA. He has been heavily involved with the IT department of the city in upgrading PERA's IT network. Mr. Kennedy is also involved in the development of a Manual of Operations for PERA so that PERA's investigative staff will have guidelines to follow.

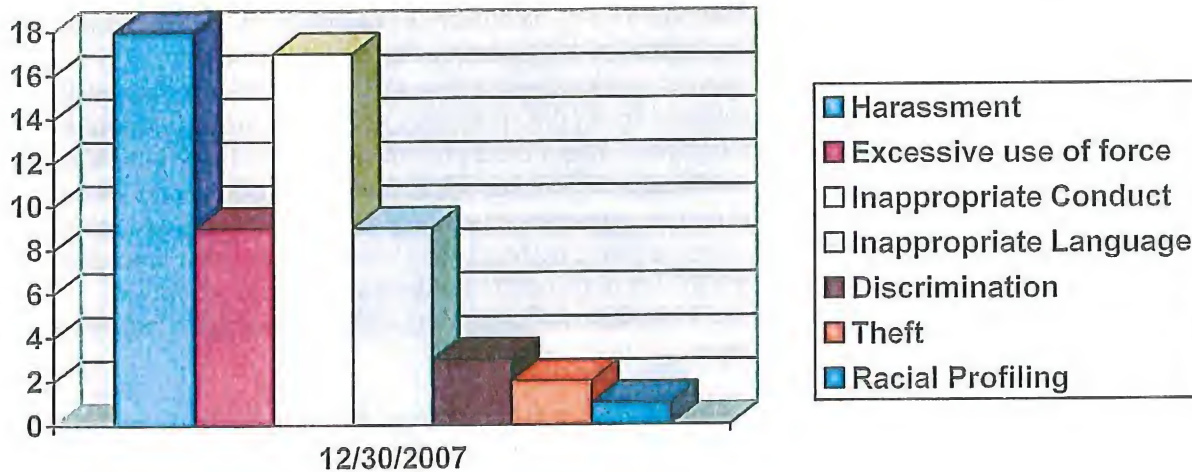
Mr. Roderick J. Kennedy was officially appointed Full-time Case Investigator March 7, 2007.

Ms. Kathy Gee, Confidential Secretary

She was appointed in December 2004, as the Confidential Secretary of PERA. She reports directly to the Executive Director, which investigates allegations of police misconduct in the City of Providence. Ms. Gee assist the Executive Director and his investigators in handling all duties of the PERA office as they pertain to emergency and non-emergency situations and complaints. She is not only the Confidential Secretary but also the PERA point of contact for the community. She is a licensed Notary Public, instrumental in developing the PERA website, has produced PERA informational pamphlets and brochures, and runs the overall daily operations of the office with the daily dealings with departments at City Hall. She is also responsible for performance of complex and difficult, duties concerning highly confidential law enforcement matters. She along with Mr. Kennedy has been developing a data system for PERA and a Manual of Operations guideline. Ms. Gee in her short tenure has developed close working relationships with strategic members of departments at City Hall, which offer expertise to PERA. Ms. Gee accepted the position at PERA because she believes in the mission and purpose of PERA, and is willing to offer her support as well as her skills to make this a functioning and productive organization.

DATA ANALYSIS

During the calendar year 2007, PERA has received 31 complaints from the community. These 31 complaints contain 59 allegations of Harassment, Excessive Use of Force, Inappropriate Conduct, Inappropriate Language, Discrimination, Theft, and Racial Profiling. Of these 31 complaints 3 do not currently meet the criteria for a complaint as set forth in the Ordinance and the Administrative Rules of PERA.



	2007
Cases Open – 31	Allegations
Category 1 – Harassment	18
Category 2 – Excessive use of force	9
Category 3 – Inappropriate conduct	17
Category 4 – Inappropriate language	9
Category 5 – Discrimination	3
Category 6 – Theft	2
Category 7 – Racial Profiling	1
For the Year of 2007 we have 31 cases and 59 Allegations	

PERA began interviewing sworn police officers of the Providence Police Department directly after the RI Supreme Court did not allow a stay against PERA. To date 39 police officers have been formally interviewed on 15 cases.

Additional officers have been spoken to but do not necessarily fall within the guidelines of an officer who has had an allegation against him or her.

There are also officers who have been asked to interview but are currently serving in the U.S. Armed Forces abroad. They will be interviewed upon their official return to police duties.

PERA conducted its first ever Evidentiary Hearing on December 10, 2007 regarding Inappropriate Conduct and Use of Unnecessary Force. A panel of 5 board members, randomly selected, heard testimony from a complainant, who refuse representation by counsel provided by PERA, and a sworn officer of the Providence Police Department, also represented by counsel.

The deliberations for the hearing were held on December 28, 2007 and the panel recommended meeting on January 17, 2008 after holiday commitments and the transcription of the hearing would be unavailable. The panel met on January 17, 2008 and is providing their findings of fact to the Chief of Police with their recommendations. Additional Evidentiary Hearings are being scheduled in several complaints.

TRENDS

PERA has addressed the initial slow process of acquiring Providence Police Department (PPD) data. PERA staff now obtains police records without the necessity of contacting the Internal Investigations and Inspection Unit, and Internal Affairs Bureau (IAB). However, beyond public record data it is still necessary to involve IAB to acquire such items as audio, video, booking data etc. Other divisions of the department also continue to be helpful.

A second trend continues to be one of training. PERA still see complaints where police officers have no specialized training in dealing with individuals who suffer a mental illness due to alcohol, drugs, or other disease. These situations usually escalate to an arrest for disorderly conduct when with additional training these individuals could be assisted to their needs and not face arrest.

Thirdly complainants are still not aware of the police officers' names and in some instances badge numbers. A policy of identification and reasons for stop or arrest should be adopted where the officers fully identify themselves and the reason for the stop or arrest.

COMMUNITY OUTREACH

Mr. Deary sits on the Minority Outreach Committees to the Urban League Civil Rights Roundtable and RI Chiefs of Police.

During the past legislative session a compromise was being sought between the community and the Chiefs as to language acceptable to both for a law to continue data collection statistics with relevance to motor vehicle stops (Title 31 Chapter 21.2).

He continues on these panels and has met with Senator Rhoda Perry and Representative Joe Alves on Racial Profiling legislation for the 2008 session.

PERA continues to give out palm cards to the community and Board Member address community groups on a personal basis to advertise PERA. The Outreach Committee continues to meet and discuss new ways to reach the community such as TV ads, radio and newspaper advertising.

INFORMATION TECHNOLOGY

Based on the victory of PERA over the Providence FOP in November 2006 the upgrade of PERA office equipment was undertaken. First an office copier, printer, fax and e-mail device was purchased capable of handling all PERA's business as can be seen by the PERA Annual Report of 2006 and 2007 which were totally prepared, printed and bound by PERA staff; an estimated savings in the thousands of dollars.

Research was conducted by staff as to the best management software program available to handle PERA casework. A decision was reached to purchase IAProfessional from CI Technologies, the same system being utilized by hundreds of police departments including the Providence Police Department. Initial attempts to purchase the software were considered somewhat high at \$10,000, but after negotiations by staff the program was purchased for \$2,500. Also with PERA staff connections with Boston Massachusetts Police Department we were able to receive initial up front training for free.

PERA staff attended the CI Technologies Training Seminar in November 2007 for additional training. A new server was purchased to handle the IAPRO software. The installation process is still continuing. The process has been slowed down by necessary purchases for additional support supplies, and scheduling difficulties with the IT department of the city. PERA's office network had to be redesigned. Currently the server and software are in place and our network is complete. The complete files of PERA are being downloaded into the software program.

RESOURCES

Initially when PERA was founded PERA was authorized 2 investigators. The second investigator position has never been filled. PERA returned thousands of budget dollars to the city during this time 2002-2006. However, the second investigator position was not funded again in the 2008 budget. PERA continues to operate at a loss of one full person for the year making it all but impossible to adhere to time lines prescribed by ordinance. Hopefully funding for this position will be forthcoming in the 2009 budget. Currently the investigator is also doing all the IT work for the PERA office.

PERA continues to address the situation where representatives of sections of the city have claimed they have complaints but they are afraid to come to PERA offices. Along this avenue PERA has begun to look for additional office sites throughout the city.

LAWSUIT

Attorneys for PERA have filed a brief with the RI Supreme Court in support of our position regarding the constitutionality of the Providence External Review Authority (See Appendix A).

*Please contact Providence External Review Authority for
copies of these legal documents at (401) 228-6989*

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT

PROVIDENCE LODGE NO. 3,
FRATERNAL ORDER OF POLICE;
KEITH LAFAZIA; and
JOSEPH SARRASIN

Case No. SU-06-0343

vs.

[P.C. 06-4859]

PROVIDENCE EXTERNAL REVIEW
AUTHORITY; THE CITY OF PROVIDENCE;
and DAVID N. CICILLINE, in his capacity
as Mayor of the City of Providence

BRIEF OF APPELLEES

ON APPEAL FROM A DECLARATORY JUDGMENT AND ORDER OF THE
PROVIDENCE COUNTY SUPERIOR COURT

Appellees:

PROVIDENCE EXTERNAL REVIEW AUTHORITY;
THE CITY OF PROVIDENCE; and DAVID N.
CICILLINE, in his capacity as Mayor of the City of
Providence

By their Counsel,

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INTRODUCTION

The office of the Providence External Review Authority ("PERA") officially opened to receive citizen complaints on June 24, 2005. (PERA Bi-Annual Report, 2006-I, App. Tab C.) In 2005, four complaints were referred for active investigation and PERA delivered notification of the complaints to the Providence Police Department Office of Internal Affairs. The first two officers called upon to explain their actions before PERA and their union (collectively, the "Officers") brought this declaratory judgment action to challenge the validity of Providence Code of Ordinances, Section 18 ½-2 (the "PERA Ordinance")

In this declaratory action, the Officers, sought to have the PERA Ordinance invalidated based upon an assertion that it conflicts with the Law Enforcement Officers' Bill of Rights, R.I. Gen. Laws §§ 42-28.6-1 *et seq.* ("LEOBOR"). Specifically, the Officers sought a declaration that the PERA Ordinance, in its entirety, is invalid based on the contention that the City, in enacting the ordinance, impermissibly and unlawfully invaded an area reserved exclusively to the state. Simultaneously, the Officers asserted that the PERA Ordinance runs afoul of Providence's Home Rule Charter.¹

PROCEDURAL BACKGROUND

Based upon an agreed upon record submitted to the Superior Court, hearing on the parties' arguments went forward on November 3, 2006 after briefing submitted pursuant to a negotiated schedule. The Superior Court, Mr. Justice Fortunato presiding, rejected the Officers' attempt to invalidate the PERA Ordinance in toto.

¹ The Officers asserted below that PERA violates the City's Home Rule Charter ("HRC") through an alleged misallocation of duties to the Chief of Police based upon a textual analysis of HRC Section 1001(a). This argument has, apparently, been abandoned.

Here, the Officers contend that Judge Fortunato “effectively rewrote the ordinance”.²

In fact, as set forth herein, the Superior Court acted in accord with this Court’s pronouncements regarding appropriate principles of statutory construction, striking a portion of the ordinance in the context of this declaratory judgment action. Specifically, as to the central textual dispute regarding the PERA Ordinance’s construction, the Superior Court explained PERA’s operation as follows:

They make a recommendation. And the police chief, regardless of what the ordinance purports to say in terms of his meting out punishment... if the police chief or other people interested in this ordinance believe that the police chief can just get the recommendation, tune it up a little bit or accept it in whole and then sanction the police officer, that is an absolutely incorrect prerogative or power that has been conferred on the police chief by this ordinance. And that provision that would allow the police chief to do that, without proceeding through the Law Enforcement Officers’ Bill of Rights, must be declared unlawful because it offends the provisions of [LEOBOR].... (Tr. at 37.)

Ultimately, the Superior Court, acting pursuant to the Uniform Declaratory Judgments Act, R.I. Gen. Laws § 9-30-1, specifically held: (1) PERA could continue to conduct investigations and hearings of alleged police misconduct and, if sustained, PERA could make such recommendations as it deemed appropriate to the Chief of Police; (2) the PERA Ordinance shall not be construed or interpreted as authorizing PERA to directly impose discipline on any law enforcement officer under any circumstances; and (3) the ordinance should not be construed as authorizing the police chief to impose any discipline without

² At the November 3, 2006 hearing, the Officers’ counsel argued, “[Y]ou can’t rewrite an ordinance. You may declare it invalid to the extent that it requires the imposition of discipline, but you can’t just rewrite it and say this is how it’s going to be.” (Tr. at 24.) In response, the Superior Court stated, “I have no intention of rewriting this or any other ordinance. But it seems to me that it is within the prerogatives of the superior court to declare a portion of the ordinance invalid . . . without at the same time throwing out the entire ordinance.” *Id.* at 24-25.

affording the law enforcement officer(s) involved the full protections set forth in LEOBOR. (Tr. at 28-38:) Thereafter, a Declaratory Judgment entered in accord with this decision on November 15, 2006.

After the entry of a Declaratory Judgment in PERA's favor, the Officers sought and were denied a stay of the Superior Court's Order during an emergency hearing on Wednesday, December 6, 2006. Finally, the Officers sought injunctive relief from this Most Honorable Court, pursuant to Art. I., Rule 8. After consideration of briefs submitted by the parties, this Court entered an Order on January 10, 2007 denying the Officers' Motion to enjoin proceedings before the Providence External Review Authority pending the outcome of the within appeal.

BACKGROUND: THE PROVIDENCE EXTERNAL REVIEW AUTHORITY

PERA was established in 2002 by Providence City Ordinance No. 612 (Ch. 2002-49), to provide for a system of civilian oversight with respect to the Providence Police Department. PERA was empowered to undertake investigations, conduct hearings, and make findings of fact culminating in recommendations of potential disciplinary action to the Chief of Police. In addition, PERA's mandate includes a commitment to public education regarding police procedures and constitutional rights.

Specifically, the Providence City Council (the "City Council") has empowered PERA to receive complaints alleging misconduct by police officers including, but not limited to those alleging inappropriate language or conduct, discrimination, harassment, theft, or use of excessive force. Ord. § 18½-2(b). In addition, PERA "shall conduct such outreach activities as necessary to inform the public of the authority and its practices. Any outreach shall be

conducted with sensitivity to the diversity of languages and cultures present in the city.” Ord. § 18½-2(j).

PERA has been specifically crafted to serve as a civilian board. As Providence Code of Ordinances, § 18½-2 (the “PERA Ordinance”), mandates, “The authority shall review all allegations of misconduct on the part of sworn officers of the city police department, shall investigate the same, conduct hearings and make findings of fact with respect to those allegations.... Investigators hired by the authority shall be *civilians* who have appropriate prior experience or training.” Ord. § 18½-2(a) (emphasis added).

PERA’s composition reflects civilian representation through a board comprised of twenty (20) members: three (3) mayoral appointees, two (2) members appointed by the President of the City Council, one (1) member appointed by the executive director of the City’s human relation commission and one appointee from each of the remaining City Council members. Ord. § 18½-2(c). “No person currently employed as a law enforcement officer nor any member of his or her immediate family may serve as authority members.” *Id.*

PERA’s investigative procedure is set forth within the ordinance. Within thirty (30) days of the date on which a complaint is filed, PERA’s executive director reviews the complaint and recommends to the authority: (1) the complaint be dismissed; (2) the complaint be forwarded to mediation; or (3) the complaint be transmitted for full investigation. Ord. § 18½-2(l). In addition, PERA provides an informal mediation process to resolve complaints determined to be of a more minor nature. Ord. § 18½-2(n).

Should the director conclude that a full investigation is warranted, the complaint is transmitted to a civilian authority investigator. Ord. § 18½-2(o). Upon completion of such

investigation, the executive director may either dismiss the complaint or forward it to a full hearing. Ord. § 18½-2(p).

In the event of full hearing, PERA randomly selects a five (5) person panel from its members to consider the matter. *Id.* In those instances in which the complainant is otherwise unrepresented by counsel, PERA's legal counsel presents evidence to the panel on behalf of the complainant. The police officer may be represented by counsel and union representatives, may present evidence and may conduct cross-examination of witnesses. *Id.* The executive director is empowered to compel the presence of witnesses and/or documents at evidentiary hearings by applying to the City Council for the issuance of subpoenas at the request of legal counsel for either party. Ord. § 18½-2(q).³

Ultimately, within thirty (30) days of the completion of an evidentiary hearing, the hearing panel issues: (1) a written report containing findings of fact; (2) a determination of whether or not the complaint has been sustained by a preponderance of the evidence; (3) if applicable, the level of violation described in a disciplinary matrix developed by PERA and

³ The Officers complain that PERA's administrative rules provide for the issuance of a *Garrity* warning and acknowledge that PERA has never instituted this process or issued a warning pursuant to the holding in *Garrity v. State of New Jersey*, 385 U.S. 493 (1967). However, *Garrity* provides immunity to officers who in the course of an administrative investigation make statements, under the threat of loss of employment and/or criminal prosecution, where no choice is given but to answer questions or be faced with termination. *Garrity* warnings require an officer to answer questions under the threat of termination, providing that such statements cannot be later used against these officers in a subsequent criminal proceeding. *United States v. Vangates*, 287 F.3d 1315, 1320 (11th Cir. 2002). Thus, *Garrity* warnings are only required or appropriate where, "the accused [is] deprived of his 'free choice to admit, to deny, or to refuse to answer.'" *Garrity*, 385 U.S. at 496 (citation omitted).

Here, in contrast, the Superior Court has clarified that PERA does not result in the imposition of discipline. Thus, utilization of a *Garrity* warning would conflict with the Superior Court's declaratory judgment. Moreover, PERA permits officers to take or invoke a Fifth amendment privilege and refuse to answer a question. This obviates the need for any *Garrity* warning.

the Chief of Police; and (4) a “recommendation” of discipline, if any. Ord. § 18½-2(s). The PERA hearing panel is required to make all reasonable efforts to complete evidentiary hearings and render a written decision within sixty (60) days of the completion of the investigation. Ord. § 18½-2(p).

When PERA concludes that a complaint is sustained by the evidence presented, it submits a “recommendation” to the Chief of Police. Ord. § 18½-2(s). In any case, the Chief of Police is obligated to provide PERA, the Mayor and the City Council with a written explanation of the reasons for his/her decision as to the imposition of any discipline. *Id.* In relevant portion, the centrally contested portion of the PERA Ordinance reads as follows:

(s) *Findings of fact and determination.* Within thirty (30) days of the completion of an evidentiary hearing, the hearing panel *shall* issue a written report containing findings of fact; a determination of whether or not the complaint has been sustained by a preponderance of the evidence; if applicable the level of violation described in the disciplinary matrix developed by PERA and the chief of police, and a recommendation of discipline. When a complaint is sustained, the findings of fact and the determination *shall* be submitted to the chief of police. The chief *shall* impose discipline based upon the level of violation as found in the disciplinary matrix to be promulgated by the authority in accordance with subsection (e)(1). The chief of police shall, also provide the authority, the city council, and the mayor with a written explanation of the reason(s) for his/her disciplinary decision. The hearing panel report and the police chief's explanation for his/her decision *shall* be available to the public provided that the name of the complainant and/correspondent *shall* be kept. Ord. § 18½-2(s).

Incidentally, subsection (o) of the PERA Ordinance permits the Executive Director to use his/her discretion to extend the timeframe within which an investigation must be completed, but only when he/she determines that PERA's investigation might negatively impact a related criminal investigation. Explicitly, in relevant portion, the PERA Ordinance provides:

Upon determination that a full investigation is warranted . . . [a]n investigation shall be completed within one hundred twenty (120) days of the date that the complaint was filed. . . . The application of this deadline may be held in abeyance during such time as the executive director determines that an investigation might impede or harm a related criminal investigation.

Ord. § 18 ½-2(o) (“Investigation”).

As the latest PERA Bi-Annual Report details, PERA received fourteen (14) new complaints after the Superior Court’s denial of the Officers’ request for a stay of its activities. Since January 2007, six (6) cases were closed, administratively or with findings of no probable cause.⁴ In addition, it should be noted that PERA is in the process of conducting a survey with the Providence Police Department regarding the effectiveness of the Law Enforcement Officers Bill of Rights, R.I. Gen. Laws, § 42-28.6-1, *et seq.*

BACKGROUND: THE LAW ENFORCEMENT OFFICERS BILL OF RIGHTS
(“LEOBOR”).

In contrast to PERA’s civilian-driven procedures, “The Law Enforcement Officers’ Bill of Rights enacted in 1976, is the exclusive remedy for permanently appointed law-enforcement officers who are under investigation *by a law-enforcement agency* for any reason that could lead to disciplinary action, demotion, or dismissal.” *City of East Providence v. McLaughlin*, 593 A.2d 1345, 1348 (R.I. 1991)(*citing Lynch v. King*, 391 A.2d 117, 119 n. 1 (R.I. 1978))(emphasis added).

⁴ As noted in the 2007 Bi-Annual report, PERA has arranged to now obtain police records without the cumbersome and time-consuming necessity of contacting the Internal Investigations and Inspection Unit and Internal Affairs Bureau (“IAB”). It remains necessary, however, to involve IAB to acquire items such as audio, video, booking data, etc. As the report otherwise mentions, PERA has faced “uncooperative efforts....” (2007 Bi-Annual Report, PERA App., Tab A, p. 10).

Under LEOBOR, any law enforcement officer facing charges that may result in punitive action may request a hearing before a committee comprised of three (3) active law enforcement officers. R.I. Gen. Laws §§ 42-28.6-1, 42-28.6-4. This committee has broad discretion to sustain, modify, or reverse the charges. *See* § 42-28.6-11; *see also Culhane v. Denisewich*, 689 A.2d 1062, 1064-65 (R.I. 1997)(citing *State Dep't of Env'tl. Mgmt. v. Dutra*, 401 A.2d 1288 (R.I. 1978) (citations omitted)).

“The [LEOBOR] hearing committee is not bound by the recommendations of the officer’s departmental superiors. The committee has great discretion to modify in whole or in part the recommended sanctions presented by the charging authority.” *Culhane*, 689 A.2d at 1064-65 (citing *Dutra*, 401 A.2d at 288; *Lynch*, 391 A.2d at 117 (explaining that a LEOBOR hearing committee may amend or modify the recommendation of the charging authority in respect to discipline or other punishment)).

QUESTION PRESENTED and STANDARD OF REVIEW

The global question presented in this declaratory judgment action is whether PERA is constitutional. A declaratory judgment proceeding “is neither an action at law nor a suit in equity but a novel statutory proceeding” *Newport Amusement Co. v. Maher*, 166 A.2d 216, 217 (R.I. 1960). Rhode Island’s Uniform Declaratory Judgments Act affords the Superior Court “broad discretion to ‘declare rights, status, and other legal relations whether or not further relief is or could be claimed.’” *Arnold v. Lebel*, 2007 WL 4481524 at * 2 (R.I. 2007)(quoting R. I. Gen Laws § 9-30-1). It is well settled that “[t]his statute gives a broad grant of jurisdiction to the Superior Court to determine the rights of any person that may arise under a statute,” or in this case a municipal ordinance, “as part of its original jurisdiction.” *See Canario v. Culhane*, 752 A.2d 476, 479 (R.I. 2000). When exercised, the decision to grant

declaratory relief should remain undisturbed unless the court improperly exercised its discretion, misinterpreted the law, overlooked material facts, or exceeded its authority. *Id.* (citing *Sullivan v. Chafee*, 703 A.2d 748, 751 (R.I. 1997)).

Finally, it is well settled in Rhode Island that “[q]uestions of law . . . including questions of statutory interpretation are reviewed *de novo* by this Court.” *Carnevale v. Dupee*, 783 A.2d 404, 408 (R.I. 2001); *see also Delbonis Sand & Gravel v. Town of Richmond*, 909 A.2d 922, 925 (R.I. 2006).

ARGUMENT

By its plain, ordinary terms, LEOBOR only applies to investigations by a “law enforcement agency”, not to a civilian review board. Therefore, LEOBOR neither applies to nor conflicts with PERA. Furthermore, this Court has already held that civilian municipal review of police activities does not fall within the ambit of LEOBOR. Finally, because the General Assembly did not adopt LEOBOR as the sole method by which police conduct may be examined, the City acted with the scope of its authority to enact PERA and PERA is not preempted.

I. By its plain language, LEOBOR only applies to investigations by a “law enforcement agency” and, therefore, LEOBOR neither applies to nor conflicts with PERA.

As the plain language of the statute specifies, LEOBOR applies *only* to instances where an officer is “under investigation or subjected to interrogation by a *law enforcement agency*.” *Id.* (emphasis added). Specifically, Section 42-28.6-2 of LEOBOR provides:

Whenever a law enforcement officer is under investigation or subjected to interrogation *by a law enforcement agency*, for a non-criminal matter which could lead to disciplinary action, demotion, or dismissal, the investigation or

interrogation shall be conducted under the following conditions (emphasis added.) R.I. Gen. Laws, § 42-28.6-2

In like fashion, literally every single section of LEOBOR restates and confirms that the Act was intended to apply solely to investigations undertaken by a “law enforcement agency.”^{5 6}

“The Court’s goal in interpreting a statute is to discern the meaning intended by the Legislature, especially where the words used by the statute are not defined.” *Jerome v.*

Probate Court of Barrington, 922 A.2d 119, 123 (R.I. 2007). This Court is “mindful of the

⁵ See, e.g., R.I. Gen Laws §§ 42-28.6-4 (“Right to hearing – Notice request for hearing – Selection of hearing committee”)(“the law enforcement agency shall give notice to the law enforcement officer”); § 42-28.6-5(d) (“Conduct of hearing”)(“the law enforcement officer shall provide to the charging law enforcement agency a list of all witnesses”); § 42-28.6-8 (“Witness fees”) (“Witness fees, mileage, and the actual expenses necessarily incurred in securing attendance of witnesses and their testimony shall be itemized, and shall be paid by the law enforcement agency if the officer is ultimately found innocent.”); § 42-28.6-6(c) (“Evidence at hearing – Hearing record”) (“All proceedings before the hearing committee shall be recorded by stenographic record, the expense of which shall be borne by the charging law enforcement agency”); § 42-28.6-11(c) (“Decisions of hearing committee”) (“In any proceeding under this chapter, it shall be the burden of the charging law enforcement agency to prove, by a fair preponderance of the evidence, that the law enforcement officer is guilty of the offense(s) or violation(s) of which he or she is accused.”) (emphases added).

⁶ The Officers state that this issue was “not ruled upon” by the Superior Court. (Officers’ Brief at 22.) Yet, as the Superior Court stated during the November 3, 2006 hearing, “Isn’t there a significant distinction that the discipline under [LEOBOR] is initiated by law enforcement agencies[?] This board is clearly not a law enforcement agency.” (Tr. at 14.) Later the Court made its thoughts on the issue clear again during the hearing as follows:

MR. JONES: In that case the Supreme Court said, and I’m quoting, “The legislature has created a specific statute outlining a . . . procedure to govern the investigation of a police officer for misconduct.”

THE COURT: By a law enforcement agency.

MR. JONES: It does not go on to say that, respectfully, Your Honor.

THE COURT: The Supreme Court didn’t have to say it because the statute is so clear about that.

(Tr. at 25.)

maxim that ‘ [t]he plain statutory language is the best indicator of legislative intent.’” *Id.* at 747 (citing *State v. Santos*, 870 A.2d 1029, 1032 (R.I. 2005); *Martone v. Johnston School Committee*, 824 A.2d 426, 431 (R.I. 2003)).

“It is an equally fundamental maxim of statutory construction that statutory language should not be viewed in isolation.” *In re Brown*, 903 A.2d 147, 149 (R.I. 2006)(citations omitted). That is, “When performing [the] duty of statutory interpretation, th[e] Court ‘consider[s] the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections.’” *Id.* (citing *Sorenson v. Colibri Corp.*, 650 A.2d 125, 128 (R.I. 1994)). “[T]he meaning of questionable or doubtful words or phrases in a statute may be ascertained by reference to the meaning of other words or phrases associated with it.” *State v. DiStefano*, 764 A.2d 1156, 1161 (R.I. 2000); *see also Wigginton v. Centracchio*, 787 A.2d 1151, 1155 (R.I. 2001).

“When a statute is clear and unambiguous [the Court is] bound to ascribe the plain and ordinary meaning of the words of the statute and [the] inquiry is at an end. *Unistrut v. State*, 922 A.2d 93, 98 (R.I. 2007)(citing *Moore v. Ballard*, 914 A.2d 487, 490 (R.I. 2007)). “The ‘plain meaning’ approach is not the equivalent of myopic literalism.” *In re Brown*, 903 A.2d at 150. “Of course, when [the Court] appl[ies] the plain meaning rule, it ‘remain[s] mindful of the corollary principle that we ‘will not construe a statute to reach an absurd result’”. *Marques v. Pawtucket Mut. Ins. Co.*, 915 A.2d 745, 747 (R.I. 2007)(citing *Santos*, 870 A.2d at 1032, n.5). Thus, to “determine the true import of statutory language, it is entirely proper . . . to look to ‘the sense and meaning fairly deducible from the context.’” *Id.* (citing *In re Estate of Roche*, 109 A.2d 655, 659 (N.J. 1954)).

Finally, “[T]his Court will not broaden statutory provisions by judicial interpretation unless such interpretation is necessary and appropriate in carrying out the clear intent or defining the terms of the statute.” *Simeone v. Charron*, 762 A.2d 442, 448-49 (R.I. 2000).

While LEOBOR defines “law enforcement officer”, it contains no definition of “law enforcement agency”. Elsewhere, however, the General Assembly has used “law enforcement agency”, in no fewer than 115 individual statutes, in a manner both clear and uniform. *See, e.g.*, R.I. Gen. Laws § 12-1.3-1(4) (“Law enforcement agency” means a state police organization of this or any other state, the enforcement division of the department of environmental management, the office of the state fire marshal, the capitol police, a law enforcement agency of the federal government, and any agency, department, or bureau of the United States government which has as one of its functions the gathering of intelligence data.”); R.I. Gen. Laws § 40-11-2(a)(7)(“Abused and Neglected Children – Definitions”)(“Law enforcement agency” means the police department in any city or town and/or the state police.”); R.I. Gen. Laws § 31-21.2-8(a) (“Racial Profiling Prevention Act of 2004 - Complaint procedures”)(“Each state and municipal law enforcement agency shall establish a procedure to investigate complaints of police misconduct by members of the public against personnel of these agencies....”); R.I. Gen. Laws § 5-5.1-19(a)(“Private Security Guard Business- Uniform and equipment”)(“No individual licensed by, registered by, or subject to the provisions of this chapter shall wear or display any insignia... which contains or includes the word “police” or the equivalent of that word, or is similar in wording to any law enforcement agency in this state.”); R.I. Gen. Laws § 11-18-31(b)(“Solicitation in name of law enforcement agency”)(“No person shall solicit money in the name of any law enforcement agency or any organization which would reasonably appear to be affiliated in

any way with any law enforcement agency or personnel, unless notification is given to the superintendent of the state police and the police chief of the municipality in which solicitations shall be conducted.”); R.I. Gen. Laws § 11-32-6(a)(6)(“Jurisdiction of district, superior and family courts”)(“Any court with jurisdiction over any criminal matter... may....issue orders including...[a]n order that a particular law enforcement agency within the jurisdiction of the court provide protection for a victim”); R.I. Gen. Laws § 42-66-8.2(c) (“Abuse, neglect, exploitation and self-neglect of elderly persons – Investigation of reports”)(“the director may request the intervention of the local law enforcement agency to secure reasonable access to the elderly subject of the report.”); R.I. Gen. Laws § 11-17-13(d)(2) (“Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the law enforcement agency making the seizure....”). *See also Prince George’s County v. State Commission on Human Relations*, 392 A.2d 105, 112 (Md.App. 1978) *vacated on other grounds*, 401 A.2d 661 (Md. 1979)(holding that even though the State Commission on Human Relations performs functions which enforce the laws against discrimination, the Commission is not a “law-enforcement agency” either as that term is generally defined or for purposes of Maryland’s LEOBOR because, *inter alia*, “A law-enforcement agency generally has the power to make arrests [and n]o such authority is vested in the Commission.”).

In contrast to the foregoing, the Officers rely upon a definition of “Law enforcement” culled from Black’s Law Dictionary to assert that PERA is somehow a law enforcement agency. (Officers’ Brief at 22, n.12.) Yet, the term, widely used by the General Assembly in various General Laws, speaks to the implausibility of the Officers’ contrary interpretation.

Finally, as LEOBOR does not apply to PERA, LEOBOR does not *conflict* with PERA. Notably, this Court has explained, “[T]he right to a hearing under the [LEOBOR] act simply does not vest until the chief or someone in a comparable position indicates that one of the sanctions envisioned by the terms of § 42-28.6-4 *will* be imposed upon the individual who has been charged with a violation of departmental rules and regulations.” *Zincone v. Mancuso* 523 A.2d 1222, 1224-25 (R.I. 1987)(emphasis added). Again, the City Council has decreed that the final result of the PERA process is a recommendation to the Chief of Police. That is, in its furthest reach, PERA’s application ends with a recommendation of a wide range of discipline; no sanction will be imposed absent the law enforcement agency investigation in accordance with LEOBOR.⁷

II. This Court has already held that LEOBOR does not apply to a municipal investigation of police misconduct preliminary to a departmental investigation.

This Court has already held that LEOBOR does not apply to a municipal civilian investigation of police misconduct. *City of East Providence v. McLaughlin*, 593 A.2d 1345 (R.I. 1991). As the Court explained in *McLaughlin*, “*As a preliminary proceeding not resulting directly in disciplinary action, [a civilian investigator’s] investigation [does] not have to meet the requirements of the Law Enforcement Officers’ Bill of Rights.*” *Id.* at 1351. Likewise, therefore, here, PERA’s preliminary proceedings do not have to meet the requirements of LEOBOR.

In *McLaughlin*, the investigation into an officer’s alleged misconduct began in March 1989 when the East Providence Minority Political Caucus informed the city council of alleged

⁷ Before the Superior Court’s ruling clarifying the proper interpretation of the centrally challenged provision of the PERA Ordinance, PERA, in the declaratory judgment action, took the position that this would be the correct result/procedure to follow.

racial remarks made by the officer and requested that the council investigate the matter. *Id.* at 1347. The City's affirmative-action officer, Onna Williams, proceeded to conduct a preliminary investigation into the allegations. *Id.*

Approximately six (6) months later, the affirmative-action officer filed a report with the city manager, which report stated that "the evidence shows an overwhelming preponderance of offensive behavior that is continuous and flourishing." *Id.* The report concluded that the officer had displayed conduct unbecoming an officer on numerous occasions and recommended that he be terminated. *Id.*

After the city's personnel director concurred with her findings, Ms. Williams submitted a formal complaint to the city's police department, citing the numerous occurrences set forth in her report. *Id.* Consequently, the acting chief of police commenced an internal investigation in accordance with LEOBOR. After the department's investigation led to a recommendation that the officer be dismissed from the department, the officer requested and received a hearing held over nineteen dates in accordance with § 42-28.6-4. *Id.*

Among other findings, the LEOBOR hearing committee concluded that the municipality failed to handle the matter in accordance with the statute. *Id.* at 1350-51. Specifically, the hearing committee concluded, "the matter should have been investigated in-house by a member of the East Providence Police Department and from day one, the [Officer] should have been advised that he was under investigation." *Id.* at 1351. Ultimately, the municipality petitioned this Court for certiorari to review the committee's findings. *Id.* at 1347.

In determining whether, through the affirmative-action officer's actions, the municipality violated the officer's rights under the LEOBOR, this Court explained:

We find, as the committee did, that the matter was handled appropriately from the time of [the chief's] investigation. Prior to that time Onna Williams' investigation was conducted merely to explore the need for an official investigation.... [H]er investigation laid the groundwork for her swearing out a formal complaint, which led to the official investigation. Therefore, we find that the city did not violate the statutory guidelines prior to [the chief's] official involvement. The committee erred in concluding otherwise. *Id.* (*emphasis added*).

Following its decision in *McLaughlin*, the Court has explained:

On several occasions this court has noted that if a *departmental investigation* of a police officer's conduct could result in the imposition of a disciplinary action, such as a demotion, transfer, dismissal, loss of pay, or similar action, to a permanently employed law enforcement officer, such officer is entitled to a hearing on any charge arising from the investigation before a "hearing committee" composed of three active Rhode Island law enforcement officers. *Zincone*, 523 A.2d at 1224 (*emphasis added*).

Here, as the Superior Court recognized, there is, indeed, a distinction between East Providence City Affirmative Action Officer Onna William's ad hoc investigation, constrained by no set rules or procedures, and the PERA process, governed by a formal, transparent process set forth in PERA's administrative rules and administered by members of PERA. The Superior Court framed its interpretation of *McLaughlin* as follows:

I think the inference to be drawn from that is that she had no rules, regulations or guidelines in written form to guide her as she went about doing this. And yet, the Supreme Court said that is all right because she wasn't functioning as a law enforcement agency and she wasn't meting out discipline. (Tr. at 9-10.)

In sum, PERA has been crafted so as to coexist with LEOBOR; the civilian review process may occur alone or in addition to the proceedings of the law enforcement agency. As PERA operates in accordance with this Court's pronouncement in *McLaughlin*, the Court should hold that LEOBOR neither applies to nor conflicts with PERA.

III. The Court of Appeals for the First Circuit has held that LEOBOR may coexist with a municipal investigation of police misconduct preliminary to a departmental investigation governed by LEOBOR.

In fact, PERA is not the first comprehensive arrangement for the civilian review of police activities in the City of Providence where a claim of conflict with the LEOBOR has been raised. The District of Rhode Island and, subsequently, the First Circuit Court of Appeals have already addressed the subject matter overlap between a municipal police review board intended to protect the rights of aggrieved citizens and LEOBOR, holding that the two may be reconciled to co-exist. *See Coalition of Black Leadership v. Cianci*, 570 F.2d 12, 14 (1st Cir. 1978). *See also Coalition of Black Leadership v. Cianci*, 480 F.Supp. 1340, 1341 (D.R.I. 1979) (“*Coalition II*”)(denying officers’ request to modify consent decree to require suspension of civilian complaint investigation where criminal charges arise out of the same incident.)

a. **The 1973 Consent Decree: *Coalition of Black Leadership vs. Cianci*.**

In 1971, black residents of Providence filed a federal class action suit alleging various civil rights violations committed by members of the police department. After trial of the matter, a consent decree entered on March 27, 1973, (the “Consent Decree”), providing a procedure through which a civilian complaint against an officer could be filed, investigated and resolved. *Coalition of Black Leadership*, 570 F.2d at 13.

In relevant portions, the Consent Decree provided for the investigation of each civilian complaint by the Bureau of Personnel and, thereafter, preparation of a written report regarding the investigation and a hearing on each complaint where, “the investigating officer [from the Law Enforcement Agency] and any officers complained against shall attend.” (Consent Decree at 3, PERA App., Tab B.) The hearing proceeded before a hearing officer who,

ultimately, was empowered to make a finding of either “guilty” or “not guilty”, which finding was transmitted to the Chief of Police, who was afforded discretion to either approve or reject the finding. (Consent Decree at 3-4.)

If rejected, under the Consent Decree, the Chief could, in his/her discretion, submit charges against the officer in accordance with existing departmental disciplinary procedures. In any event, the Chief’s action on the hearing decision was noted in the officer’s personnel file and all parties were notified of the action. Pursuant to the Consent Decree, records of hearings held were to be maintained for two (2) years from the original hearing date and are available to the parties to the complaint or their representatives. (Consent Decree at 4.)

b. “Coalition I”: The First Circuit’s Review

Approximately three years after implementation of the Consent Decree in 1973, the General Assembly enacted LEOBOR, prompting the Providence police officers to move for relief from the Consent Decree. See *Coalition of Black Leadership v. Cianci*, 570 F.2d 12 (1st Cir. 1978) (“*Coalition I*”).

Coalition I arose after the City and the Fraternal Order of Police of the City of Providence moved for relief from judgment in the underlying discrimination action. *Id.* at 13. The District Court treated this action as a motion to vacate the Consent Decree, denied the motion, and ordered the parties to negotiate modifications to the decree to reconcile the rights afforded under the LEOBOR with the plaintiffs’ rights to be free from “racially discriminatory conduct.” *Id.* at 13.

On appeal, the officers pressed, as one of its two principal arguments, that equity required the court to vacate the decree because of LEOBOR’s promulgation. *Id.* at 13-14. In support of this request, the officers asserted that the procedures of LEOBOR would make the

provisions of the consent decree unnecessary and, furthermore, that continued application of the decree would “result in unfairness since Providence police officers would be subject to different regulations than would the police officers in other parts of Rhode Island.” *Id.* at 14.

Ultimately, however, the First Circuit affirmed the District Court’s ruling, rejecting both arguments. In so holding, the Court explained:

The consent decree at least in part was designed to protect the rights of those citizens who felt themselves to be aggrieved by unconstitutional police misconduct. The purpose of the new state legislation [the LEOBOR] was to protect police officers from any impairment of their rights when their conduct is questioned. While there is obvious subject matter overlap between the decree and the legislation, it is also obvious that neither was developed to meet these dual and partially inconsistent purposes. *Id.* at 14.

Here, the situation with PERA requires the same conclusion. PERA flows directly from *Coalition I*. Adopting the Court of Appeals for the First Circuit’s conclusion that a civilian review procedure can co-exist with LEOBAR, PERA has been specifically crafted to do so while protecting the rights of aggrieved citizens.

IV. LEOBOR does not preempt PERA.

The preemption doctrine encompasses three types of preemption: (1) express preemption, (2) field preemption, and (3) conflict preemption. *See Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95-96, 103 S.Ct. 2890, 2899-900, 77 L.Ed.2d 490, 500-01 (1983). Field preemption prohibits municipal regulations in an area in which the General Assembly has implemented a comprehensive regulatory framework, thereby indicating its intention to reserve that area solely for state control. *See Amico’s Inc. v. Mattos*, 789 A.2d 899 (R.I.

2002).⁸ As this Court has explained the doctrine of preemption, “[a] local ordinance or regulation may be preempted in two ways. First, a municipal ordinance is preempted if it conflicts with a state statute on the same subject. . . . Second, a municipal ordinance is preempted if the Legislature intended that its statutory scheme completely occupy the field of regulation on a particular subject.” *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1261 (R.I. 1999). *See also Krivitsky v. Town of Westerly*, 849 A.2d 359, 363 (R.I. 2004). (“Indeed, the mere fact that the General Assembly regulates a particular activity does not mean that municipalities cannot impose additional restrictions that address legitimate local concerns.”). Here, application of this Court’s decisions regarding preemption and home rule shows that LEOBOR does not preempt PERA.

a. PERA does not conflict with LEOBOR

Here, the first method of preemption described in *Thornton-Whitehouse* is not relevant because LEOBAR does not address “the same subject” as civilian review and, in any case, there is no conflict between the two. PERA was designed to protect the rights of those citizens who felt themselves to be aggrieved by unconstitutional police misconduct. On the other hand, the purpose of LEOBOR is to protect police officers from any impairment of their rights when their conduct is questioned by a law enforcement agency. *See Coalition I*, 570

⁸ In *Amico’s Inc.*, the Court explained:

The issue of preemption has appeared in case after case in which we have reviewed a municipality’s authority under home rule. The dueling issues of local authority and state preeminence often intersect because home rule requires an analysis of whether the issue is of local or statewide concern, whereas preemption requires an analysis of whether the issue is implicitly reserved within the state’s sole domain. 789 A.2d at 908.

F.2d at 14 (“The consent decree [implementing a board to review formal civilian complaints] at least in part was designed to protect the rights of those citizens who felt themselves to be aggrieved by unconstitutional police misconduct. The purpose of the new state legislation [LEOBOR] was to protect police officers from any impairment of their rights when their conduct is questioned... [N]either was developed to meet these dual and partially inconsistent purposes.”).

- b. **The General Assembly did not intend that PERA occupy the entire field of regulation regarding the examination of police activities.**

Next, the second type of preemption described by this Court does not exist as the Assembly did not craft LEOBOR to completely occupy the field of regulation on the subject at issue. Rather, the Assembly carefully and repeatedly limited the reach of the LEOBOR to investigations and proceedings by a “law enforcement agency”.

The powers to the General Assembly with respect to home rule communities are set forth in § 4 of Article XIII:

Section 4. Powers of general assembly over cities and towns. -
- The general assembly shall have the power to act in relation to the property, affairs and government of any city or town by general laws which shall apply alike to all cities and towns, but which shall not affect the form of government of any city or town. The general assembly shall also have the power to act in relation to the property, affairs and government of a particular city or town provided that such legislative action shall become effective only upon approval by a majority of the qualified electors of the said city or town voting at a general or special election, except that in the case of acts involving the imposition of a tax or the expenditure of money by a town the same shall provide for the submission thereof to those electors in said town qualified to vote upon a proposition to impose a tax or for the expenditure of money. R.I. Const. Art. XIII, § 4.

Meanwhile, the Rhode Island Constitution, Section 2 of Article XIII, provides:

Local legislative powers. - - Every city and town shall have the power at any time to adopt a charter, amend its charter, enact and amend local laws relating to its property, affairs and government not inconsistent with this constitution and laws enacted by the general assembly in conformity with the powers reserved to the general assembly. R.I. Const. Art. XIII, § 2.

“Generally, state laws of statewide application preempt municipal ordinances on the same subject if the Legislature intended that they thoroughly occupy the field.” *Town of East Greenwich v. O’Neil*, 617 A.2d 104, 109 (R.I. 1992)(citing *Easton’s Point Associates, Inc. v. Coastal Resources Management Council*, 559 A.2d 633, 636 (R.I. 1989)). Here, the General Assembly did not craft LEOBOR in a manner that supports a conclusion that it intended to completely occupy the field relating to review of law enforcement conduct.

First, as noted above, the Assembly carefully and repeatedly limited the reach of LEOBOR to investigations and proceedings by a “law enforcement agency”. Thus, by its plain, ordinary terms, LEOBOR only applies to investigations by a “law enforcement agency” and not to a civilian review board.

Had the General Assembly intended, as the Officers allege, to make LEOBOR the exclusive avenue by which the conduct of police officers may be evaluated by *any* person or entity, the legislature could have clearly expressed such intent by eliminating the “law enforcement agency” limitation. The fact that the Assembly repeatedly and consistently limited the scope of the LEOBOR to law enforcement agency investigations and proceedings compels the conclusion that the Officers misapprehend LEOBOR’s scope:

Second, the Officers insist that this Court’s declarations that LEOBOR “represents the entire body of *rights* the Legislature intended to apply to police officers in this type of context,” *Town of North Kingstown v. Local 473, Intern. Broth. Of Police Officers*, 819 A.2d

1274, 1276 (R.I. 2002), and that “the Bill of Rights [is] the only source of *remedies* available to officers being interrogated”, *id.* (emphases added), indicates that PERA is preempted.

In the same vein, from LEOBOR’s statutory language, the Officers deduce that LEOBOR, “specifically mandates that its procedures are *sole* and *exclusive*” (citing R.I. Gen. Laws § 42-28.6-15 (“The remedies contained herein shall be the sole and exclusive remedies for all law enforcement officers subject to the provisions of this chapter.”)). Yet, in fashioning LEOBOR as the exclusive set of *rights and remedies* for a law enforcement officer facing discipline, the General Assembly was not foreclosing an organization such as PERA from conducting a civilian inquiry into officers’ actions. Rather, the Assembly expressed its will that officers’ disciplined by a law enforcement agency be foreclosed from seeking redress in other venues or using conflicting procedures that would otherwise apply to public employees, union members, etc. *See, e.g., City of Hagerstown v. Moats*, 568 A.2d 1181, 1185 (Md.App. 1990) (holding that Maryland’s LEOBOR could not be superseded by the rights afforded to an officer under a collective bargaining agreement); *Abbott v. Administrative Hearing Board, Prince George’s County*, 366 A.2d 756, 759-60 (Md.Ct.Spec.App. 1975).

For example, *Abbott* arose when a law enforcement officer, employed by a county government, was disciplined for the improper discharge of a firearm. *Id.* at 758. The officer proceeded to appeal the discipline. However, contrary to the procedure set forth in Maryland’s LEOBOR which provided a single path for redress, namely, review by the state’s circuit court, the officer in *Abbott* attempted to appeal his discipline to the county personnel board, in addition to following the LEOBOR procedure. In proceeding in this manner, the law enforcement officer argued that, as a county employee, regardless of the supposed

exclusivity of Maryland's LEOBOR as a remedy, he was, nonetheless, entitled to utilize the county charter's administrative appellate procedure. *Id.*

Faced with the officer's attempt to utilize duplicative avenues of review, the county filed a motion to stay his administrative appeal, contending that under Maryland's LEOBOR, exclusive jurisdiction to review a decision of the hearing board was vested in the circuit court. *Id.* The circuit court, sitting as the venue for consideration of the county's motion, stayed the officer's administrative appeal, holding that exclusive jurisdiction to hear the appeal was vested in accordance with Maryland's LEOBOR: a state statute preempting the county's procedure. On review, the Court of Special Appeals, in the decision cited by the Appellants herein, upheld the circuit court's ruling. *Id.*⁹

In sum, LEOBOR's statutory language does not evidence the General Assembly's intent that LEOBOR thoroughly occupy the entire field of legislation regarding the examination of an officer's activities. Again, LEOBOR applies to a "law enforcement agency", not a civilian review board. Meanwhile, a clear reading of this Court's decisions interpreting LEOBOR and of the LEOBOR statutory language shows that Section 42-28.6-15 means exactly what each says: if LEOBOR and, e.g., a collective bargaining agreement conflict, LEOBOR prevails as the only source of rights and/or remedies available to an officer under discipline by a law enforcement agency.

⁹ Contrary to the Officers' assertions in their prior filing seeking a stay of PERA's operation from this Court, *Abbott* never addressed the existence of a civilian review board and, therefore, does not support their assertion that LEOBOR would preempt such a board. The "preemption" addressed by the court in *Abbott* involved the exclusivity of the remedies set forth in Maryland LEOBOR, a subject where Maryland's LEOBOR, as Rhode Island's, expresses explicit preemption of all other rights and remedies that would otherwise be available to a law enforcement officer.

PERA and LEOBOR are not so diametrically opposed to each other as to require the invalidation of PERA. PERA is not expressly preempted. Meanwhile, the General Assembly manifested no intention to deprive the City of jurisdiction to legislate in this area. As no conflict exists between the PERA Ordinance and LEOBOR, the Officers' preemption argument fails for want of satisfying the requisite elements for establishing such a claim.

V. In light of the principles of statutory construction and this Court's prior decisions, the Superior Court's interpretation of the PERA Ordinance should be affirmed.

As a state court of last resort, this Court is not limited by federalism constraints in construing municipal ordinances. *See DiRaimo v. City of Providence*, 714 A.2d 554, 567 (R.I. 1998). Here, the Court should uphold the Declaratory Judgment entered by the Superior Court as the Judgment entered below encapsulates the legally correct interpretation of the relevant statutory and case authority.

Principally, the Officers sought the invalidation of the PERA Ordinance by asserting an alleged inconsistency in Section 18 ½-2(s). In particular, the Officers place focus on the alleged inconsistency between, on one hand, the mandate that PERA issue a *recommendation* coupled with the fact that the Chief is required to give an explanation for his/her decision, and, on the other hand, language stating that the Chief "shall" impose discipline.

In essence, the Officers' present a textual analysis of the PERA Ordinance that ignores its plain language. Section 18 ½-2(s), quoted above, explicitly dictates that the final outcome of PERA's fact finding is a *recommendation* to the Chief of Police. Ord. § 18½-2(s). Yet, the Officers place myopic focus on the word "shall" in the third sentence to assert that the PERA process results in the imposition of mandatory discipline absent LEOBOR's protections.

By its plain language, the PERA Ordinance is silent as to the exact moment of LEOBOR's application. Precisely, the ordinance contains no provision that even remotely suggests that LEOBOR plays no role at any point in the process of the Chief's imposition of discipline. Recognizing this, Judge Fortunato properly clarified the interplay between LEOBOR and PERA in light of basic principles of statutory construction.

In Rhode Island, "[o]ur process of statutory construction further involves a 'practice of construing and applying apparently inconsistent statutory provisions in such a manner so as to avoid the inconsistency.'" *Kells v. Town of Lincoln*, 874 A.2d 204, 212 (R.I. 2005) (quoting *Montaquila v. St. Cyr*, 433 A.2d 206, 214 (R.I. 1981)). It is a well-recognized tenet of this Court that "when . . . faced with statutory provisions that are in *pari materia*, we construe them in a manner that attempts to harmonize them and that is consistent with their general objective scope." *State v. Dearmas*, 841 A.2d 659, 666 (R.I. 2004). "In construing a statute, [a] court must give effect to all parts of the statute, if reasonably possible, in keeping with its declared purpose. Additionally, the words used must be given their ordinary and customary meaning unless a contrary intention appears on the face of the statute. If the language of a statute is plain and unambiguous and expresses a single, definite, and sensible meaning, that meaning is presumed to be the [Council's] intended meaning and the statute must be interpreted literally." *Rhode Island Chamber of Commerce v. Hackett*, 411 A.2d 300, 303 (R.I. 1980). The same rules of statutory construction apply to municipal ordinances. *Mongony v. Bevilacqua*, 432 A.2d 661, 663 (R.I. 1981). Again, "When charged with the duty of statutory construction, one must read the language so as to effectuate the legislative intent behind its enactment." *Gilbane Co. v. Poulas*, 576 A.2d 1195, 1196 (R.I. 1990). Moreover, the court is obliged to interpret a municipal ordinance as valid if possible. *Carlson v. Town of*

Smithfield, 723 A.2d 1129, 1131 (R.I. 1999). Here, the Superior Court appropriately determined, as a matter of law, PERA, a civilian review board, is not “a law enforcement agency” and, therefore, LEOBOR neither applies to any of its activities nor preempts its actions.

The Officers complain that PERA contains no severability clause. (Officers’ Brief at 25.) However, the Providence Code of Ordinances clearly states:

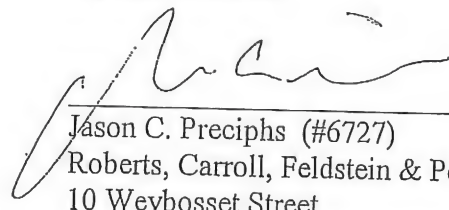
It is hereby declared to be the intention of the city council that the sections, paragraphs, sentences, clauses and phrases of this Code are severable, and if any phrase, clause, sentence, paragraph or section of this Code shall be declared unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of the volume, since the same would have been enacted by the city council without the incorporation in this Code of any such unconstitutional phrase, clause, sentence, paragraph or section. Ord. § 1-5. (“Severability of Parts of Code.”)

Finally, the Officers cite an article published in *The College Hill Independent* as authority for the proposition that “the City Council would not have enacted the PERA ordinance as neutered by Justice Fortunato.” (Officers’ Brief at 26.) Yet, no journalist’s thought process need be consulted as to this issue. PERA has continued to exist and operate after the Superior Court’s decision. Furthermore, the Mayor and individual members of the City Council have exercised their prerogatives to appoint, reappoint and/or replace PERA’s members. Finally, the City has continued to fund PERA and PERA continues to work with the Police Department and the Chief.

CONCLUSION

For the foregoing reasons, Appellees respectfully request this Most Honorable Court to affirm the Declaratory Judgment and Order entered by the Superior Court and deny and dismiss this appeal.

Appellees,
PROVIDENCE EXTERNAL REVIEW
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and DAVID N. CICILLINE, in his capacity as
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CERTIFICATION

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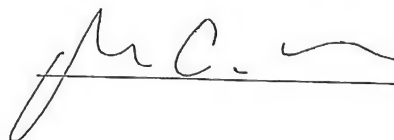


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